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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-1547

JOHN MOHAN, WILLIAM BOYD, WESLEY BRODERSON, GEORGE POPLASKI, EDMUND DOBBS, AND BRUCE THOMPSON, INDIVIDUALLY AND AS POLICE OFFICERS OF THE CITY OF CHICAGO,

Petitioners,

vs.

HARVEY L. KERR,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF CERTIORARI INSTANTER.

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INDEX.

	PAGE
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement of the Case	3
Reasons for Granting the Writ	5
I. The Court of Appeals Has Decided an Important Question of Federal Law Which Has Not Been Settled by This Court	5
II. The Seventh Circuit Court of Appeals Has Applied an Improper Standard in Conflict with the Standard Universally Applied in Civil Cases	8
III. If the Admission of the Confession Was Error, It Was Harmless Error	10
Conclusion	13
Appendices	
A. Opinion of the Court of Appeals (.... F. 2d ...., 7th Cir., December 26, 1972)	A1
Concurring Opinion of Chief Judge Swygert	A5
B. Opinion of the Court of Appeals (424 F. 2d 1134)	A7

CITATIONS.

Cases.

Beauregard v. Wingard, 362 F. 2d 901 (9th Cir., 1966) 6

Bowens v. Knazze, 237 F. Supp. 826 (N. D. Ill., 1965) .. 6

Brown v. United States, ... U. S. .... (41 U. S. L. W. 4475, April 19, 1973) 12

Conrad v. United States, 255 F. 2d 247 (5th Cir., 1958) 8, 9

Escobedo v. Illinois, 378 U. S. 478 (1964) 4

Harrington v. California, 395 U. S. 250 (1969) 12

Harris v. United States, 401 U. S. 222 (1971) 12

Hysler v. Florida, 315 U. S. 411 (1942) 9

Jackson v. Denno, 378 U. S. 368 (1964) 8

Kerr v. City of Chicago, 424 F. 2d 1134 (1970) *cert. den.* 400 U. S. 833 .....2, 3, 4, 9

Kerr v. Mohan, ... F. 2d .... (7th Cir., December 26, 1972) 5, 9

Land v. Dollar, 330 U. S. 731 (1947) 5

Larsen v. Domestic and Foreign Commerce Corp., 337 U. S. 682 (1949) 5

Martin v. Duffie, 327 F. Supp. 960 (D. N. Mex., 1971) .. 6, 7

Milton v. Wainwright, 407 U. S. 371 12

Pierson v. Ray, 386 U. S. 547 (1967) 6, 7

Sopp v. Gehrlein, 232 F. Supp. 881 (W. D. Pa., 1964) .. 7

United States v. Crisp, 435 F. 2d 354 (7th Cir., 1970) .. 12

United States v. General Motors, 323 U. S. 373 (1945) .. 5

United States v. Teague, 445 F. 2d 1141 (7th Cir., 1971) 12

United States Statutory Provisions.

28 U. S. C. § 1254(1) 2
42 U. S. C. § 1983 .....3, 5, 6

Miscellaneous.

American Law Institute, Model Code of Evidence, Rule 505, Comment p. 241 8
McCormick, Evidence, § 75, p. 157 8
3 Wigmore, Evidence (Chadbourn rev. 1972), § 815, p. 286, n. I; § 1050, p. 11 8

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Supreme Court of the United States

OCTOBER TERM, 1972.

No. .....

JOHN MOHAN, WILLIAM BOYD, WESLEY BRODERSON, GEORGE POPLASKI, EDMUND DOBBS, AND BRUCE THOMPSON, INDIVIDUALLY AND AS POLICE OFFICERS OF THE CITY OF CHICAGO,

Petitioners,

vs.

HARVEY L. KERR,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The petitioners, John Mohan, William Byrd, Wesley Broderson, George Poplaski, Edmund Dobbs and Bruce Thompson, individually and as police officers of the City of Chicago, jointly and severally pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in this proceeding on December 26, 1972, rehearing for which was denied February 1, 1973.

OPINION BELOW.

The opinion of the Court of Appeals, filed on December 26, 1972 is not yet reported, but is reproduced in Appendix A to this petition. The instant petition arises from a trial after remand. The Court of Appeals' initial opinion, 424 F. 2d 1134 (1970), cert. den. 400 U. S. 833, is reproduced in Appendix B.

JURISDICTION.

The jurisdiction of the Court rests on 28 U. S. C. § 1254(1).

The opinion below was filed December 26, 1972. Respondent's petition for rehearing was denied January 16, 1973, and petitioners' petition for rehearing was denied February 1, 1973. The original time for filing a petition for certiorari in this Court expired May 2, 1973.

On April 27, 1973, petitioners mailed to the Circuit Justice an application for a twenty-one-day extension of time for filing their petition for certiorari. This application (A-1095) was denied by Mr. Justice Rehnquist April 30, 1973. An application to permit the filing of this petition instanter, addressed to the Court, is bound with this petition.

QUESTIONS PRESENTED.

1) Whether a civil rights plaintiff's confession of a crime may be excluded in a civil trial if it is an essential part of the defendants' case.

2) Whether criminal standards of admissibility may be applied in a civil trial to exclude from the jury's consideration an allegedly coerced confession.

3) Whether the admission of such a confession in a civil trial is harmless error if the jury is properly instructed and there is other evidence sufficient to support a verdict for defendants.

STATUTES INVOLVED.

UNITED STATES CODE, title 42, § 1983.

> "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any citizen of the U. S. or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE.

This case is a civil action arising out of a complaint filed under 42 U. S. C. §§ 1983 and 1988 by the respondent, Harvey Kerr, against six police officers, alleging, *inter alia*, that they coerced his confession to a murder, which resulted in his incarceration and trial on that charge. The issue in this petition is whether the text of respondent's confession is admissible to prove two major elements in the police officer's defense: 1) That the confession was in petitioner's own words, was not composed by the officers, and was not coerced; and 2) That the confession was sufficient for the officers to conclude they had probable cause to hold and charge the plaintiff.

At trial, Kerr filed a motion in limine, claiming that hearing the facts of the alleged murder as contained in the confession would prejudice the jury, and that the confession would inject the issue of Kerr's guilt or innocence of the murder into the trial. Although the court denied the motion, the judge gave the protective jury instructions requested by the respondent and which were directed by the Court of Appeals in the first appeal. *Kerr v. City of Chicago*, 424 F. 2d at 1139. Appendix B, p. A12. Those instructions directed the jury not to take the respondent's

guilt or innocence of murder into account in deciding whether he was deprived of his civil rights. Those instructions read:

> "In this case you are to determine whether the defendants, or any of them, violated the plaintiff's civil rights. Whether the plaintiff was guilty of a crime at the time of the occurrences testified to in this proceeding is entirely irrelevant and is not to be considered by you in any way in reaching your verdict in this case." [Respondent's No. 18.]

The complaint had alleged that when the officers took Kerr into custody on June 19, 1963, for questioning in connection with a fire, burglary and murder, they held him for more than a day without bringing him before a magistrate, permitting him to make bail, informing him of his constitutional rights or allownig him to contact counsel. The respondent also claimed that he was physically abused and coerced into reciting a prepared confession which was used to indict him for murder and burglary. Petitioners denied the confession was in any way coerced and relied on the confession as giving them the grounds for holding respondent for preliminary hearing.

In the first jury trial of respondent's civil rights action, the petitioners prevailed. The respondent appealed, obtaining a reversal and another trial. *Kerr* v. *City of Chicago,* 424 F. 2d 1134 (7th Cir. 1970), cert. denied 400 U. S. 833. In the second jury trial, the petitioners prevailed once again, and the respondent appealed, alleging that his confession had been improperly admitted into evidence.

(Plaintiff was never convicted of arson, burglary and murder. The confession had been suppressed, under the rule of *Escobedo* v. *Illinois,* 378 U. S. 478, at his trial on the murder charge in the Circuit Court of Cook County. At the conclusion of the evidence, the jury was unable to reach a verdict. The plaintiff was subsequently released when a *nolle prosequi* was entered.)

In this, the second appeal of this civil rights action, the Court of Appeals reversed the judgment and ordered a third trial,

stating that "the nature of the confession . . . could prejudice the jury against the merits of the plaintiff's claim in his civil rights case." *Kerr* v. *Mohan, et al.*, ... F. 2d at ...., App. p. A3.

REASONS FOR GRANTING THE WRIT.

I. The Court of Appeals Has Decided an Important Question of Federal Law Which Has Not Been Settled by This Court.

Although the opinion below does not finally dispose of this action, but remands the case to the District Court for a third jury trial, this case is nevertheless ripe for review. This Court has chosen to review cases otherwise appropriate, despite lack of finality, where an issue to be decided is "fundamental to the further conduct of the case." *United States* v. *General Motors Corp.*, 323 U. S. 373 at 377 (1945); *Larsen* v. *Domestic and Foreign Commerce Corp.*, 337 U. S. 682 at 685 n. 3 (1949); *Land* v. *Dollar*, 330 U. S. 731 at 734 n. 2 (1947).

The federal question at issue in the present case is the admissibility of respondent's confession of a crime, in a civil rights action under 42 U. S. C. § 1983, when used by petitioner police officers as a vital element in their defense. The admission into evidence of respondent's confession implicating himself in the murder is fundamental to petitioners' case, for without it, they are unable to show why they had probable cause to continue holding respondent in custody for preliminary hearing, indictment, and trial. And because respondent complained of being incarcerated without bail, it was necessary for petitioners to show the seriousness of the crimes respondent was suspected of committing.

The admissibility of the confession of a crime in a civil action under 42 U. S. C. § 1983 has not previously been considered by this Court. If the opinion of the court below is permitted to stand, the future of probable cause as a defense to a civil

rights action will be in doubt. The proof of probable cause necessarily depends on evidence adverse to an accused. *Martin* v. *Duffie*, 327 F. Supp. 960 (D. N. Mex. 1971). The fact that a confession carries inferences adverse to a civil rights plaintiff is not sufficient reason to deprive a law enforcement officer of its use in his defense. It would not be reaching far to extend the principle of the court below to prevent defendants from proving other elements of probable cause.

The standard applied in civil rights cases was set in *Pierson* v. *Ray*, 386 U. S. 547, 555 (1967), where this Court held that an arrest made in good faith and with probable cause was valid. Thus, in the present case where police officers stand accused of coercing a confession, the confession, itself, is an essential part of the officers' defense. Respondent's theory at trial was that the confession was not a product of his mind, but a statement prepared by the police which he was forced to repeat to a stenographer (Complaint ¶ 14, Transcript, pp. 57, 64, 71, 110, 135-6). Since petitioners relied on the confession as supplying the probable cause necessary to detain plaintiff, it is essential that they be able to prove that they did not compose a confession and force the respondent to sign it. To exclude the confession deprives the petitioners of the ability to prove a major element in their decision to charge the respondent with robbery and murder.

As a defense to a § 1983 action, law enforcement officers must prove that their conduct was guided by a reasonable belief the accused committed a crime and that they could not reasonably have foreseen that a deprivation of constitutional rights might result from their conduct. *Bowens* v. *Knazze*, 237 F. Supp. 826, 829 (N. D. Ill., 1965). An arrest based on probable cause does not violate the arrestee's civil rights just because he is later found innocent of the crime charged, *Beauregard* v. *Wingard*, 362 F. 2d 901, 903 (9th Cir., 1966), and the arrestee has the burden of showing lack of probable cause for arrest,

when viewed in light of the circumstances at the time of arrest, *Martin* v. *Duffie*, 327 F. Supp. 960, 962 (D. N. Mex., 1971).

In this type of civil rights case, it is vital for both sides to tell the jury facts relating to respondent's alleged criminal offense. The murder charge against the respondent, his detention, and subsequent criminal trial all formed the factual basis for the civil rights complaint (Complaint ¶ 18). To decide whether plaintiff has been deprived of his rights, the jury must know the specific circumstances involved. Only by discussing the nature of the plaintiff's alleged offense, and the confession which was one of the reasons for detaining him, could the defendants establish the element of probable cause necessary for their defense. *Pierson* v. *Ray*, 386 U. S. 547 (1967).

Moreover, in the instant case the entire text of the confession is the best and most reliable evidence available to petitioners to rebut respondent's allegations. Kerr claimed that the confession was not in his words, but was in the language of the officers, who set it before him and forced him to sign. After hearing Kerr's speech pattern and vocabulary, the jury was in a position to judge whether he or petitioners composed the confession.

If the jury were kept in the dark about the nature of the offense Kerr was suspected of committing, it would be free to speculate about the reasons for plaintiff's arrest. The jury must know the character of the crimes involved, and the existence of the confession as an element of probable cause for arrest, to dispel any notion that respondent was arrested at random, or as part of a vendetta. Additionally, it is important for the jury to know the kind of crime Kerr was suspected of, for the reasonableness of the officer's actions is affected by the seriousness of the offenses involved. *Sopp* v. *Gehrlein*, 232 F. Supp. 881, 884 (W. D. Pa., 1964).

II. The Seventh Circuit Court of Appeals Has Applied an Improper Standard, in Conflict with the Standard Universally Applied in Civil Cases.

The standard announced by the court below is more restrictive than, and conflicts with, the standard for admitting confessions and admissions in criminal cases. In criminal cases since *Jackson* v. *Denno*, 378 U. S. 368 (1964), a confession may not be put before the jury for consideration of its voluntariness. In civil cases, however, a confession is merely one species of admission. Such an admission made by a party-opponent, even under duress, is admissible in a civil case, subject to comment on its weight. The commentators are in accord on the admissibility of confessions in civil cases. 3 Wigmore, Evidence (Chadbourn rev. 1972), § 1050, p. 11. See also McCormick, Evidence, § 75, p. 157; American Law Institute, Model Code of Evidence, Rule 505, comment, p. 241. Confessions have been admitted in some civil cases even though the confession was sensational or shocking and may have tended to prejudice the jury. 3 Wigmore, Evidence (Chadbourn rev. 1972), § 815, p. 286, n. 1.

Even in criminal trials admissions of criminal conduct are admissible against the accused. Perjury cases are a common instance where the details of a crime committed by a party have been held admissible as a vital element of proof in a criminal proceeding, despite the potentially inflammatory matter they contain. In one such case, *Conrad* v. *United States*, 255 F. 2d 247 (5th Cir., 1958), the Fifth Circuit, in contrast to the instant holding of the Seventh Circuit, permitted a jury in a subsequent proceeding to hear incriminating admissions. In *Conrad*, a policeman was tried for giving grand jury testimony which conflicted with statements given earlier to Internal Revenue officers. Those statements contained admissions that the officer took illegal payments. Nevertheless, the Fifth Circuit held that *all* of the defendant's testimony must be considered, before the

jury could fairly determine that the officer had committed perjury.

The holding in *Kerr* v. *Mohan*, excluding such a confession, is not consistent with the holding in *Conrad*. In *Kerr*, the plaintiff put his confession in issue, stating that he did not compose it; yet, he would deny the petitioners' right to let the jury consider the entire text of that confession.

In another perjury case, *Hysler* v. *Florida*, 315 U. S. 411 (1942), the plaintiff was a convicted murderer who claimed, in a petition for habeas corpus, that one of the key prosecution witnesses had committed perjury. On appeal of the denial of his petition, this Court stated that the petitioner "has full opportunity to have a jury pass on such a [perjury] claim provided he first makes an adequate showing of the substantiality of his claim." 315 U. S. at 416. As in the present case, *Hysler* concerned a collateral proceeding where highly prejudicial information about a murder was contained in the alleged perjured testimony. Yet, this Court stated that a jury could and must hear this testimony in order to fairly ascertain the facts. Similarly, in the present case, the jury must have an opportunity to know all relevant facts, including the confession, in order to determine the legality of petitioners' actions.

The standard used in the perjury cases, which permits the jury to hear all of the alleged perjured testimony despite the potential prejudice involved, was, curiously, the standard enunciated by the Court of Appeals in the first *Kerr* appeal (Appendix B), where the court stated:

> "To consider whether the confession was voluntary, it is necessary for the jury to be allowed to consider all relevant facts regarding the circumstances under which a confession from the plaintiff was obtained. . . . Thus, the jury was entitled to hear the testimony surrounding all the events from the moment Kerr was taken from his home until his indictment by the Grand Jury. All of the acts of commission and omission—the totality of all of the circumstances—are of great importance in determining

whether plaintiff's confession was coerced in violation of his civil rights and thereby cognizable under 42 U. S. C. § 1983." 424 F. 2d at 1138; App., pp. A10-11.

The refusal of the Court below to permit the jury to consider all the circumstances—including the allegedly coerced confession—unnecessarily imposes a criminal standard in a civil case and does so not only in conflict with its prior opinion in this case but also in conflict with opinions of this Court as well as that of the Fifth Circuit.

III. If the Admission of the Confession Was Error, It Was Harmless Error.

The evidence so overwhelmingly favored the petitioners in this case that the prejudicial effect, if any, of the confession was minimal. The jury heard sufficient evidence upon which it could base a verdict for petitioners. A summary of the evidence makes it clear that Kerr's proof was insubstantial:

The sole witness to testify to the events at the signing of the confession was respondent himself. Respondent claimed that two of his friends, who had also been brought in for questioning concerning the robbery and murder, were present when a police officer read the confession respondent was allegedly required to repeat (Tr. 135). However, neither friend appeared in court to corroborate respondent's version of those events.

The only two witnesses who did testify on Kerr's behalf contradicted him. Respondent's story about physical abuse when he was first brought to the station house was not only uncorroborated, but contradicted. Respondent claimed he was struck across the bridge of his nose by one officer (Tr. 49); his witness, Butler, however, testified plaintiff was kicked in the chest, not the nose, and by a wholly different officer (Tr. 168). And if respondent was in fact injured by the blow as he claimed, he failed to note it on his admission card when he entered county jail the following day (Tr. 336-8).

Even respondent's photographic evidence contradicted his testimony regarding being struck. He submitted a series of large glossy photographs taken less than twenty-four hours after he claimed he was struck across the bridge of his nose. These photos assertedly show that a cut was opened and his nose was swollen (Tr. 99-101, 106-7, 116-7). In fact, they show Kerr uninjured. The jury viewing these photographs, would understandably doubt respondent's story.

Respondent's only other witness, his mother, contradicted other parts of respondent's story. She denied he repeated his confession in her presence at the police station (Tr. 183), while respondent admitted that he did (Tr. 71). At trial, respondent claimed he was not given food, but his mother admitted that at the prior criminal trial she testified she had seen him eat (Tr. 221).

Kerr's case was so fragile, without credible substantiating witnesses, and petitioners' case uncontradicted, except by the respondent, that the admission of the confession in its entirety had no influence on a verdict that was never in doubt.

In addition, since the jury was otherwise fully informed of the facts of the alleged murder, the impact of those facts contained in the confession was necessarily minor. The jury first became aware of the nature of the offense for which respondent was questioned and ultimately arrested when they were told in the opening argument for respondent that respondent confessed to "burglary and murder" (Tr. 20).

Respondent was his own opening witness. He, himself, described in detail the contents of the confession he claimed he was forced to make, including those parts implicating him in the murder (Tr. 57-9, 71).

Respondent repeated he confessed to a murder, as well as the details of the murder, on cross-examination, with no objection (Tr. 110, 135-8, 143). Further, respondent permitted four of the petitioners and one defense witness to testify to

the kind of crime for which respondent was arrested or to the details of the murder as contained in the oral confession they had heard respondent make (Tr. 241, 290, 349, 357, 358-68, 382-3, 402-3, 407-8). Respondent never objected.

The jury learned the details of the murder from the written confession, from the unobjected testimony of petitioners, as well as from respondent's own mouth. It is difficult to perceive a difference between the effect on the jury of the written confession and that of the descriptions contained in respondent's and petitioners' testimony. If the admission of the written confession was error, it was harmless in the context of the admission of the selfsame evidence procured or permitted by the respondent, himself.

In the instant case, the confession was held inadmissible on evidentiary grounds. However, this Court has held that even an infirmity of constitutional dimensions will not bar a confession in some cases. Even confessions taken in violation of *Miranda* v. *Arizona* are not inadmissible in all events. *Harris* v. *United States*, 401 U. S. 222 (1971). In *Harrington* v. *California*, 395 U. S. 250, 254 (1969), this court rejected the notion "that a departure from constitutional procedures should result in an automatic reversal, regardless of the weight of the evidence." See also *Brown* v. *United States*, ... U. S. .... (41 L. W. 4475, April 17, 1973); *Milton* v. *Wainwright*, 407 U. S. 371; *United States* v. *Teague*, 445 F. 2d 114 (7th Cir. 1971); *United States* v. *Crisp*, 435 F. 2d 354 (7th Cir. 1970). In these criminal cases, erroneously admitted confessions or admissions were held not to require reversal if the error was found to be harmless beyond a reasonable doubt.

In the present case, the standard for the admission of the confession need not be even as restrictive as the reasonable doubt standard of criminal cases. Where the jury was properly instructed, and the petitioners showed that they had probable cause, the admission of the confession was, at worst, harmless error.

CONCLUSION.

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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May 11, 1973.

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APPENDIX A.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

September Term, 1972—September Session, 1972

No. 71-1551
HARVEY L. KERR,
Plaintiff-Appellant,

vs.

JOHN MOHAN, WILLIAM BOYD, WESLEY BRODERSON, GEORGE POPLASKI, EDMUND DOBBS and BRUCE THOMPSON, Individually and as Police Officers of the City of Chicago, Jointly and Severally,
Defendant-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 66 C 1731
Alexander J. Napoli,
Judge.

Argued September 28, 1972—Decided December 26, 1972

Before SWYGERT, *Chief Judge*, HASTINGS, *Senior Circuit Judge*, and CUMMINGS, *Circuit Judge*.

PER CURIAM. This appeal is from a judgment for defendants after a second jury trial of a civil action arising under the Civil Rights Act (42 U. S. C. §§ 1983 and 1988) seeking both compensatory and punitive damages from Chicago police officers. The thrust of the complaint was that when the defendants took the plaintiff into custody for questioning in connection with a

fire, burglary, and murder, they first held him for more than a day without charging him with a crime, without bringing him before a judge or magistrate, without permitting him to make bail or bond, without informing him of his constitutional rights or allowing him to contact counsel, and they then subjected him to a polygraph test without his or his parents' consent and to various physical abuses in order coercively to obtain a confession which defendants used to detain the plaintiff in custody illegally for a period of 18 months. The first trial also resulted in a judgment adverse to plaintiff, but that judgment was reversed and the case was remanded for a new trial.[1] *Kerr* v. *City of Chicago,* 424 F. 2d 1134 (7th Cir. 1970). In the interest of brevity, we will not repeat the basic facts set forth in our prior opinion but will discuss only the facts necessary to resolve this appeal.

Plaintiff's first point is that the federal trial court improperly allowed into evidence his purported confession which had been suppressed in his criminal trial by the Circuit Court of Cook County under the rule of *Escobedo* v. *Illinois,* 378 U. S. 478. On the second day of the retrial below, defense counsel was permitted to cross-examine plaintiff as to the voluntariness of the confession he had given on June 19, 1963. Although plaintiff's counsel objected to any part of the confession being read, defense counsel was permitted to make the following interrogation, reading from plaintiff's confessionary statement:

> "Q. Were you asked this question and did you make this answer:
>
> > " 'All right, Harvey. Before taking the statement, I would like to inform you that you do not have to answer any questions unless you wish to do so of your own free will and that it will be without any promises of reward or immunity, and the questions you answer in this statement may be used against you now or at

1. In the first appeal we affirmed only the dismissal of the City of Chicago as a party.

some other time. Knowing this, do you still wish to make a statement?

"'A. Yes.'

"Q. Were you asked that question by Mr. Armonda, and did you make that answer?

"A. I don't remember." Tr. 144-145.

At the oral argument, plaintiff's counsel agreed that this part of the confession was admissible to show whether it was made voluntarily and after plaintiff was advised of his rights.

During the course of defendants' case, over objection, defense counsel was permitted to put into evidence and to read plaintiff's entire confession to the jury. At the oral argument here, counsel for defendants forthrightly admittted that those parts of the confession referring to plaintiff's implication in the murder were not relevant to the issues at trial. Certainly the nature of the confession reciting, as it did, the details of plaintiff's participation in the planning and execution of a burglary culminating in the violent death of the victim, could prejudice the jury against the merits of the plaintiff's claim in his civil rights case against the police officers. This point was not briefed on the first appeal of this case, nor did our prior opinion discuss the admissibility of the confession. While we regret the necessity for a third trial, a reversal and remand is again required because the principal issue is not plaintiff's guilt or innocence but whether he was deprived of his civil rights in violation of federal statutes. The substance of the confession so irremediably interjected the question of plaintiff's guilt into this case that its prejudicial impact could not be cured by admonition to the jury that plaintiff's guilt was not at issue. At the retrial, only those portions of the confession bearing on its voluntariness may be received in evidence.

Plaintiff also argues that the trial court improperly allowed into evidence hearsay testimony that plaintiff had committed other crimes with which he was never charged. Thus defendant Leslie Broderson, a sergeant of detectives, was permitted to

testify that in conversation with various people in plaintiff's neighborhood, he learned that plaintiff

> "along with a number of other young men in the neighborhood, had previously been involved in burglaries of a business that was adjacent to the scene of the murder, and that they had been in possession of whiskey at about that time which they had attempted to sell and, in some cases, had given away to various other persons." Tr. 236.

Plaintiff's counsel's hearsay objection and motion for a mistrial were denied. Then the following colloquy occurred:

> "MAREMONT [Defendants' counsel]:
>
> "Q. All right. Now, what relevance did the fact that Harvey Kerr was involved in burglaries have with the murder of Mrs. Mozeiko?
>
> "A. Well, in my inspection of the premises of the scene of the homicide, which was made some time later, I noted that the window in the side of the building where the Expressway Lounge was located was adjacent to a porch which led into the building of the scene of the murder. And I felt there was a strong possibility that the same people that had perpetrated this—these burglaries had come in contact with the victim and in some way had been responsible for her death.
>
> "MR. GERTZ: Your Honor, I move to strike the answer and ask for a mistrial.
>
> "THE COURT: I will strike out the part of what he felt. That I will strike out. The jury will disregard that part of his answer." Tr. 236-237.

Although the Broderson testimony was prejudicial, we think the unstricken portions were admissible to show that defendants acted reasonably and in good faith in asking plaintiff to come to the police station and in interrogating him[2] and that, together with

2. Broderson testified that when he came to plaintiff's apartment early in the morning of June 19, 1963, he told him and his parents that he was not required to come to the police station for questioning about a serious crime under investigation, but plaintiff and his parents were willing that he should go.

information later acquired, defendants had portable cause ultimately to arrest him. As stated in *Pierson* v. *Ray*, 386 U. S. 547, 555, 557:

> "a peace officer who arrests someone with probable cause is not liable for false arrest simply because the innocence of the suspect is later proved.
>
> * * * * *
>
> [and] the defense of good faith and probable cause, which the Court of Appeals found available to the officers in the common-law action for false arrest and imprisonment, is also available to them in the action under § 1983."

Here the probativeness of Broderson's testimony was sufficiently essential to the defense to outweigh its prejudicial nature. Furthermore, plaintiff's instruction 18 adequately mitigated any undue prejudice that might otherwise have resulted from the admission of this testimony.[3]

At the retrial of this cause, the district court should bear in mind our prior ruling that "in a civil rights action alleging the extraction of an involuntary confession, the issue of guilt or innocence is irrelevant and the jury must not be confused." 424 F. 2d at 1139.

REVERSED AND REMANDED.

SWYGERT, *Chief Judge*, concurring in part:

I would also base the reversal and a remand for a new trial on the additional ground that the hearsay testimony of police officer Leslie Broderson as recited in the majority opinion was inadmissible. This hearsay could not possibly have had

3. Plaintiff's instruction No. 18 provides:

> "In this case you are to determine whether the defendants, or any of them, violated the plaintiff's civil rights. Whether the plaintiff was guilty of a crime at the time of the occurrences testified to in this proceeding is entirely irrelevant and is not to be considered by you in any way in reaching your verdict in this case."

any logical connection with the investigation of a murder. The rumor that plaintiff was involved in burglaries of the Expressway Lounge which was adjacent to the scene of the alleged murder and that he and his associates had possessed whiskey which they had attempted to sell had no relevance, standing alone, to the alleged murder. Thus this hearsay testimony could not have served as probable cause for the plaintiff's arrest at the police station. It could serve only to prejudice him and adversely influence the jury with respect to his claim.

APPENDIX B.

UNITED STATES COURT OF APPEALS,
Seventh Circuit.

No. 17345.

HARVEY L. KERR,
Plaintiff-Appellant,

vs.

CITY OF CHICAGO, a Municipal Corporation, John Mohan, William Boyd, Wesley Broderson, George Poplaski, Edmund Dobbs and Bruce Thompson, Individually and as Police Officers of the City of Chicago, Jointly and Severally,
Defendants-Appellees.

March 11, 1970.

Rehearing Denied April 7, 1970.

Before CUMMINGS and KERNER, *Circuit Judges*, and GRANT, *District Judge.**

KERNER, *Circuit Judge.*

This is a review of a civil action arising out of a Civil Rights complaint under 28 U. S. C. §§ 1331 and 1343(a), and 42 U. S. C. §§ 1983 and 1988, seeking both compensatory and punitive damages. The matter was tried before a jury and there was a finding for defendants.

* Chief Judge Robert A. Grant is sitting by designation from the United States District Court for the Northern District of Indiana.

Plaintiff, Harvey L. Kerr, alleges he was denied a fair trial. He states that the trial court improperly struck portions of the complaint; that the court improperly refused to allow introduction of testimony to prove the civil rights violations; that instructions were improperly refused; that he was not allowed to introduce testimony of the cost of legal services; and that the City of Chicago was improperly dismissed as a party defendant.

On June 19, 1963, Harvey Kerr, a black youth, age 17, alleges he was taken from his home at 5:30 a.m. by Chicago Police Officers. The officers, without warrants, informed his parents they did not believe the youth was involved in any crime but wished to interrogate him at the station, and they would return him in time to attend his regular school classes.

Kerr states he was placed in a police car and driven to another home where another youth was picked up, and both were taken to the Maxwell Street Police Station some distance from their homes. Kerr was questioned about a burglary and fire in an apartment. He denied any knowledge of the matter, and states he was both kicked and hit by an officer during the interrogation. Both of the youths, after several hours, were taken to Police Headquarters at 11th and State Streets where Kerr was required to take a polygraph examination. He was then returned to the Maxwell Street Station about 11:30 a.m. His mother, who had been searching for him at various stations, arrived at about the same time and was not allowed to speak to him.

Shortly after his return to the station, Kerr states he was told he would be allowed to use the washroom and to have food and water if he confessed. Several statements were read to him after which he made three statements to a court reporter, each of which he signed. He was then allowed the use of facilities, provided food and water, and allowed to see his parents.

At about 4:00 p.m. on the same day, he was removed again to Police Headquarters and held without charge. The next

morning, June 20, he was taken before a magistrate of the Boys Court, some 27 hours after he was removed from his home. Counsel appeared for him at the hearing and the magistrate bound Kerr over to the Cook County Grand Jury. He was indicted for murder and burglarly. Not being allowed bond or bail, he was held for trial until December 13, 1963; at the conclusion of all evidence, the jury was unable to reach a verdict. Kerr continued to be held without any further action until December 2, 1964, when a *nolle prosequi* was entered.

Plaintiff alleges in his complaint that the defendants acted in "deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U. S. C. § 1983. The complaint alleges the following violations of Kerr's civil rights: that for approximately 27 hours he was never brought before a judge, court or magistrate although in session; not charged with a crime; not permitted to make bail or bond; not permitted to contact or obtain counsel and advice; not informed of any formal charges; not informed of his privilege against self-incrimination; not informed of his right to the advice of counsel: and that for 14 hours he was not permitted to eat or use washroom facilities. Additionally, Kerr alleges that he was physically abused and the confession was not voluntarily obtained; and that the polygraph test was taken without his or his parents' consent. The complaint concludes that as a direct and proximate result of these acts of the defendants, the plaintiff suffered pain and injury and mental anguish and seeks judgment therefor.

The district court struck various allegations of the complaint and refused to admit evidence concerning the following alleged violations of his civil rights:

> (a) That plaintiff was forced to submit to a lie detector test without the permission of his parents;
>
> (b) That plaintiff was not allowed to see his parents during his detention although his mother was present at the police station in which he was being held;

(c) That for 27 hours of detention plaintiff was not:

(i) charged with a crime;
(ii) Allowed to make bail or post bond;
(iii) permitted to contact an attorney;
(iv) informed of any formal charges placed against him;
(v) informed of his privilege against self-incrimination;
(vi) informed of his right to the advice of an attorney;

(d) That for 14 hours of detention plaintiff was not permitted to contact his family or his friends.

The theory of the court was that under the law at the time of arrest and detention of Harvey Kerr, these allegations, even if true, did not constitute a violation of rights, privileges or immunities secured by the Constitution and laws. Since the constitutional rights alleged to be violated were not declared until the Supreme Court's opinion in Escobedo v. Illinois, 378 U. S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977 (1964), and Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), and since these decisions were held not to be retroactive, Johnson v. New Jersey, 384 U. S. 719, 86 S. Ct. 1772, 16 L. Ed. 2d 882 (1966), the district court held that these allegations failed to state a claim upon which relief could be granted. We disagree.

The defendants and the district court have misconstrued plaintiff's allegation of violation of his constitutional rights. Plaintiff claims that his rights were violated by the obtaining of an involuntary confession and the use of this confession to illegally detain the plaintiff for a period of 18 months. *Cf.* Spano v. New York, 360 U. S. 315, 79 S. Ct. 1202, 3 L. Ed. 2d 1265 (1959). To consider whether the confession was voluntary, it is necessary for the jury to be allowed to consider all relevant facts regarding the circumstances under which a confession from the plaintiff was obtained. Lynumn v. Illinois, 372 U. S. 528, 83 S. Ct. 917, 9 L. Ed. 2d 922 (1963).

The court in Williams v. Peyton, 404 F. 2d 528, 530-531 (4th Cir. 1968), said "more than twenty years ago, the Supreme Court cautioned that the record must be scrutinized with special care to determine whether a young defendant's confession is voluntary. Haley v. Ohio, 332 U. S. 596, 599, 68 S. Ct. 302, 92 L. Ed. 224. Facts to be considered include the youth of the defendant, the length of his detention without counsel and any failure to send for his parents, or to bring him promptly before a judge of a juvenile court." In Haley v. Ohio, 332 U. S. 596, 68 S. Ct. 302, 92 L. Ed. 224 (1948), the Supreme Court held a confession was coerced where a 15-year-old black youth was arrested and taken from his home at midnight and questioned by police for five hours without counsel being present.

Thus, the jury was entitled to hear the testimony surrounding all the events from the moment Kerr was taken from his home until his indictment by the Grand Jury. All of the acts of commission and omission—the totality of all the circumstances —are of great importance in determining whether plaintiff's confession was coerced in violation of his civil rights and thereby cognizable under 42 U. S. C. § 1983. We conclude that the district court erred in striking the allegations in the complaint and refusing to admit evidence as to those allegations.

INSTRUCTIONS.

Various instructions offered by Kerr were refused by the court. The only instructions given to the jury concerning the law involved was a reading of the statute, 42 U. S. C. § 1983, and the reading of the Illinois statute requiring that a person in custody must be taken before the nearest magistrate without delay. We shall discuss the plaintiff's instructions which we have found to have been erroneously refused.

The court refused the following instruction:

> This case should be considered and decided by you as an action between persons of equal standing in the com-

> munity, of equal worth, and holding the same or similar stations in life. The law is no respecter of persons; all persons stand equal before the law, and are to be dealt with as equals in a court of justice.

This instruction is taken *haec verbae* from Mathes, Jury Instructions and Forms for Federal Civil Cases, 28 F. R. D. 401, 414. In a civil rights action against policemen, such an instruction is necessary in order that the jury properly understands that people employed by the state do not stand in any higher station in the community. Without this instruction, the jury may give a greater weight to the testimony of the policemen and we think it was error to deny the giving of the instruction.

The court refused to give the following instructions:

> In this case you are to determine whether the defendants, or any of them, violated the plaintiff's civil rights. Whether the plaintiff was guilty of a crime at the time of the occurrences testified to in this proceeding is entirely irrelevant and is not to be considered by you in any way in reaching your verdict in this case.
>
> An indictment for a crime by a grand jury is nothing more than an accusation of such crime and is not to be considered as being any evidence that plaintiff committed any such crime.

Since the jury was told that the plaintiff was indicted by the Grand Jury and his confession in the police station was admitted in evidence, without proper instruction the jury was able to speculate as to the guilt or innocence of the plaintiff in determining the liability of the defendants. However, in a civil rights action alleging the extraction of an involuntary confession, the issue of guilt or innocence is irrelevant and the jury must not be confused. The above instructions are directly in point and the failure to give them was error.

It is fundamental that plaintiff is entitled to instruct the jury as to his theory of the case. Embodied in plaintiff's theory is the right of an individual not to be deprived of his liberty

without due process of law. 42 U. S. C. § 1983 gives an individual a right to maintain a cause of action against a state official acting outside his authority when the individual's rights have been violated. However, to instruct a jury as to the statute alone, in a manner as complex as a civil rights action, is insufficient to inform the jury as to what are the rights of an individual. A jury cannot be expected to know exactly what rights are guaranteed an individual under the Constitution and the failure to instruct the jury accordingly is error.

The plaintiff proposed the following instructions on the rights of the individual and we think it was error to refuse them:

Plaintiff's instruction No. 19:

> The statute just outlined to you comprises one of the Civil Rights Acts enacted by the Congress under the Fourteenth Amendment to the Constitution of the United States. The Fourteenth Amendment to the Constitution provides that:
>
> > "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Plaintiff's instruction No. 23:

> At all times the plaintiff in this case had the legal right not to be deprived of any liberty protected by the Constitution or laws of the United States, except by due process of law. To be deprived of liberty "without due process of law" means to be deprived of liberty without authority of law. In this respect, this plaintiff has the same legal rights as have the defendants and as all people living in the United States.

Plaintiff's instruction No. 24:

> Even a person under arrest has certain liberties that cannot be taken from him, including the liberty to be free from unlawful attacks on his physical being. It has al-

ways been the policy of the law to protect the physical integrity of every person from unauthorized violation or interference. So this plaintiff, while under arrest had the right under the Federal Constitution not to be deprived of this remaining liberty without due process of law.

Plaintiff's instruction No. 25:

An arrest by state officers without a warrant, without probable cause is an arrest without due process. Imprisonment pursuant to such an arrest is also without due process.

Plaintiff's instruction No. 28:

Due process of law in criminal cases means, among other things, that no one can be punished until he has been convicted and sentenced by a court with authority to act in his case. In other words, a police officer does not have the authority to punish a person in the process of arresting him for commission of a crime, even if he observed the person committing the crime. A police officer or sheriff's deputy does not have the authority to punish a prisoner for the crime for which he is awaiting trial, or for which he is serving a sentence. Punishment can only be lawful if it is based on the sentence of a court following a judgment of guilty.

Plaintiff's instruction No. 31:

If you should find, from a preponderance of the evidence, that the defendants acted beyond the bounds of their lawful authority under state law, at the time and place alleged, then you may further find that the defendants did, "without due process of law," deprive the plaintiff of liberty secured to him and protected by the Constitution and laws of the United States. And if you so find, then you must proceed to determine the amount of the actual or compensatory damages suffered or sustained by the plaintiff, as a proximate result of the defendants' conduct.

Plaintiff's instruction No. 32:

If, however, you should find from a preponderance of the evidence in the case that the defendants acted within the

> bounds of their lawful authority then you should return a verdict in favor of the defendants; for, as previously stated, if the defendants acted within the limits of their lawful authority under state law, then the defendants did not deprive the plaintiff of any liberty "without due process of law."

Defendants specifically object to plaintiff's instruction number 25 as not being a proper statement of the law in Illinois as set out in Ill. Rev. Stat. 1963, ch. 38, ¶ 107-2. While Illinois law may have been different, the Supreme Court in Henry v. United States, 361 U. S. 98, 80 S. Ct. 168, 4 L. Ed. 2d 134 (1959), held that an arrest without a warrant and without probable cause was unlawful. Further, failure to object to the arrest does not waive an individual's right to complain that his liberty was denied without due process as contended by the defendants.

The district court also refused the following instruction to the jury:

> The fact that the defendants had no specific intent or purpose to deprive plaintiff of his civil rights will not absolve them from liability if they did in fact deprive them of those rights.

This instruction is a proper statement of the law, Stringer v. Dilger, 313 F. 2d 536 (10th Cir. 1963): Basista v. Weir, 340 F. 2d 74 (3d Cir. 1965), and we do not think the giving of such instruction would confuse the jury but, instead, would be helpful.

The following instruction as to the meaning of "under color of law" was also refused:

> Acts are done under color of law of a state when state officials act within the limits of their lawful authority. But acts are also done "under color of law" when state officials act outside the limits of their lawful authority while pretending to act in the performance of their official duties; that is to say, it is an unlawful act for an official

> to abuse or misuse the power he has been given as an official. And it is an unlawful act under color of law if the act could only have been done by an official exercising his powers outside the bounds of his lawful authority. The phrase "under color of law" applies to acts done under color of any state law or county or city ordinance, or any regulation issued under a state law or ordinance or acts done under any state or local custom.

The instruction contains a proper statement of the law. Monroe v. Pape, 365 U. S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961); Williams v. United States, 341 U. S. 97, 71 S. Ct. 576, 95 L. Ed. 774 (1951); United States v. Classic, 313 U. S. 299, 61 S. Ct. 1031, 85 L. Ed. 1368 (1941); and Marshall v. Sawyer, 301 F. 2d 639 (9th Cir. 1962), and we think the instruction was necessary.

The district court also refused the following instructions:

> If you find from a preponderance of the evidence in the case: (1) that the defendants used greater force on the plaintiff than the defendants believed was reasonably necessary in order to accomplish the lawful purpose intended, or (2) that the defendants used more force on the plaintiff than would have appeared to a reasonable person, in like circumstances, to be necessary, in order to accomplish the lawful purposes intended, or (3) that the defendants acted as they did toward plaintiff, not to perform their lawful duties but prompted by another unlawful motive, then you may find that the defendants acted unlawfully, contrary to the law of the State of Illinois.
>
> Whether or not the force used in making an arrest was unnecessary, unreasonable or violent must be considered in light of all the circumstances and the standard to be applied is that of the conduct of an ordinary prudent person under existing circumstances.

Without these instructions, the jury could not properly evaluate whether the acts of the defendants were within their lawful authority, and we think it was error to refuse these instructions.

EVIDENCE OF DAMAGES.

The court refused to allow any testimony by Kerr's parents of the payment of attorneys' fees that were expended by them on behalf of Kerr in the criminal proceedings. Defendants contend that under § 1983, only those funds expended by "every person" who alleges the harm and damages arising from civil rights violations may recover for the funds expended as damages. Section 1983 makes no reference to funds expended. The "every person" identified in the section refers to the person who caused the violation of the rights guaranteed, and not the party who has been injured. It would be unrealistic to hold that any minor who is without funds or property could not recover monies expended on his behalf by his parents when in need of professional help. Certainly, defendants are not entitled to a windfall because the plaintiff himself did not pay the bill.

The defendants also contend that attorneys' fees expended in a criminal action are not recoverable in a civil rights action. We disagree. In Basista v. Weir, 340 F. 2d 74 (3d Cir. 1965), the court held that federal common law controls the question of damages in civil rights action with the purpose being to vindicate the civil rights of the individual. 340 F. 2d at 85-86. A plaintiff in a civil rights action should be allowed to recover the attorneys' fees in a state criminal action where the expenditure is a foreseeable result of the acts of the defendant. *Cf.* Brooks v. Moss, 242 F. Supp. 531 (W. D. S. C. 1965): McArthur v. Pennington, 253 F. Supp. 420 (E. D. Tenn. 1963).

CITY OF CHICAGO AS A PARTY.

Plaintiff claims that the district court erred in dismissing the complaint against the City of Chicago under pendent jurisdiction. United Mine Workers of America v. Gibbs, 383 U. S. 715, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966). We agree with the defendant City of Chicago that plaintiff's claim for indemnity under Ill. Rev. Stat. ch. 24 § 1-4-5 and Ill. Rev.

Stat. ch. 85 § 2-302 should not be heard in federal court. Claims for indemnity are separate and apart from tort claims and are not consolidated with the tort claim unless there is another contested issue such as the duty of the indemnitor to defend. See Cunningham Bros., Inc. v. Bail, 407 F. 2d 1165 (7th Cir. 1969), cert. denied 395 U. S. 959, 89 S. Ct. 2100, 23 L. Ed. 2d 745.

Defendants' motion to dismiss the appeal for failure to comply with Federal Rule of Appellate Procedure 10 by not designating the entire transcript as the record in this case is denied.

For the foregoing reasons this case is reversed and remanded to the district court for further proceedings consistent with this opinion except that the dismissal of the City of Chicago as a party is affirmed.

Affirmed in part and reversed and remanded with directions.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. .....

JOHN MOHAN, WILLIAM BOYD, WESLEY BRODERSON, GEORGE POPLASKI, EDMUND DOBBS, AND BRUCE THOMPSON, INDIVIDUALLY AND AS POLICE OFFICERS OF THE CITY OF CHICAGO,

Petitioners,

vs.

HARVEY L. KERR,

Respondent.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF CERTIORARI INSTANTER.

The petitioners pray that this Court enter an order permitting the filing of their petition for writ of certiorari instanter.

1. The United States Court of Appeals for the Seventh Circuit rendered its opinion herein December 26, 1972. Petitioners' petition for rehearing was denied February 1, 1973. The time for filing a petition for certiorari thus expired May 2, 1973.

2. On April 27, 1973, an application (No. A-1095) for extension of time in which to file a petition for certiorari was sent to the Circuit Justice, Mr. Justice Rehnquist. The application was denied April 30, 1973. Petitioners' counsel received

notice of the denial May 3, 1973, too late to permit a timely filing. That application, setting forth the jurisdictional grounds and grounds for seeking an extension of time, is reproduced in an appendix immediately following this motion.

3. It will not prejudice the respondent if the petition is permitted to be filed.

As pointed out in petitioners' original application (¶ 6), the respondent was informed of the application before it was filed and respondent's attorney voiced no objection whatsoever to the twenty-one-day extension requested. The accompanying petition has been expedited and submitted to this Court well within the requested twenty-one-day period. In light of respondent's affirmative waiver of objection, the few days delay that will result in the disposition of this case will not affect respondent adversely.

Also as noted in the application (¶ 7), the Chief Judge of the United States District Court for the Northern District of Illinois has recently ordered the trial of all civil cases delayed until the disposal of certain pending criminal trials. There is thus no assurance that this case will be able to be promptly retried in the District Court. Surely a delay of three weeks or less in the filing of this petition will have little or no effect on the date of the ultimate final disposition of this action.

4. It is believed the granting of this motion will not substantially delay the Court's consideration of the merits of the petition. It is understood that the present term of court is scheduled to end June 18, 1973. This motion and petition are being sent to the Court May 11, 1973. If the Court allows the petition to be filed, the thirty-day period within which respondent is permitted to file a brief in opposition will expire within the Court's present term.

5. Petitioners recognize that Rule 34(2) requires that applications for extension of time filed later than ten days prior to the expiration of the original time must be supported by compelling reasons. However, petitioners believe that the facts set forth in ¶ 5 of the application state extraordinary circumstances

which warrant the granting of the brief extension requested as permitted under the Rule.

6. Where there is a failure to comply with the ten-day requirement of Rule 34(2), it is a violation which affects no substantial rights of either party and ought not interfere with the Court's consideration of a meritorious petition. By statute, 28 U. S. C. § 2101(c), this Court may permit extensions of up to sixty days for the filing of petitions for certiorari. If an extension is otherwise available to a petitioner who makes application ten days prior to the due date, it should not, it is submitted, automatically bar the application where it is sought, as in the present case, five days before the expiration of the time to file.

More than the rights of private parties are at issue in this action. As authorized by ordinance (Municipal Code of the City of Chicago, Illinois, chapter 6, section 6-2(c)), petitioners are being represented by this governmental body because questions of wide public interest, respecting civil rights and the criminal justice system, are at issue. For these reasons it is respectfully requested that the accompanying petition be considered on the merits of the issues it raises.

Respectfully submitted,

RICHARD L. CURRY,
Corporation Counsel of the City of Chicago,
511 City Hall, Chicago, Illinois 60602,
Attorney for Petitioners.

WILLIAM R. QUINLAN,
RICHARD F. FRIEDMAN,
Assistant Corporation Counsel,
Of Counsel.

May 11, 1973.

APPENDIX.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1972

[A-1095]

John Mohan, William Boyd, Wesley Broderson, George Poplaski, Edmund Dobbs, and Bruce Thompson, individually and as police officers of the City of Chicago,
Petitioners,
vs.
Harvey L. Kerr,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

APPLICATION FOR EXTENSION OF TIME IN WHICH TO FILE PETITION FOR CERTIORARI.

To The Honorable William H. Rehnquist, Associate Justice and Circuit Justice for the Seventh Circuit:

The petitioners pray that an order be entered extending the time for filing their petition for writ of certiorari 21 days to and including May 23, 1973.

1. The United States Court of Appeals for the Seventh Circuit rendered its opinion herein (a copy of which is attached) December 26, 1973 [sic; 1972]. Petitioners' petition for rehearing was denied February 1, 1973. The time for filing a petition for writ of certiorari expires May 2, 1973.

2. This case arose as a civil rights suit for damages under 42 U. S. C. §§ 1983 and 1988. The respondent alleged that he was arrested for and held on charges of murder, burglary, and arson without probable cause and without being advised of his rights. He also alleged that the confession, which formed a basis for the charges brought against him, was coerced. At the respondent's trial for murder the confession was suppressed, and the jury could not agree on a verdict. Respondent was not retried.

At the instant civil rights trial, judgment was entered on the jury's verdict for petitioners. Respondent appealed, alleging two errors of the district court in admitting evidence. The Court of Appeals for the Seventh Circuit, in its opinion herein, found no error in the district court's first ruling, but reversed and remanded, holding the admission of respondent's confession prejudicial error, despite the giving of respondent's protective instruction that guilt or innocence of the criminal charge is irrelevant to the issue of deprivation of civil rights.

3. Petitioners seek this Court's review of the Seventh Circuit's decision holding that an allegedly coerced confession is not admissible in a civil trial. Their petition is sought on the following grounds:

A. Although in a criminal case a confession may not be set before the jury for the jury's determination of its voluntariness, *Jackson* v. *Denno*, 378 U. S. 368 (1964), the rule is different in civil cases. The Seventh Circuit's opinion appears to be inconsistent with the uniform principle that admissions, although allegedly coerced, are admissible in civil cases. Coercion goes to weight, not admissibility in civil cases. The criminal rule is a prophylactic one, not based on the evidentiary value of coerced confessions. The Seventh Circuit's opinion is also in conflict with a decision of the Fifth Circuit Court of Appeals, which held that in a subsequent proceeding, a jury may hear a person's admission of criminal activities. *Conrad* v. *United States*, 255 F. 2d 247 (1968).

B. A police officer's defense to a civil rights action for unlawful arrest and incarceration is probable cause. *Pierson* v. *Ray*, 386 U. S. 547 (1967). In the present case the petitioners maintain that it was respondent's confession which gave them probable cause to incarcerate respondent on the charge of murder and to initiate the prosecution against him. To say, as the Seventh Circuit has, that the confession is inadmissible, deprives the officers of one of the main elements of their defense. Moreover, the confession has major evidentiary value, since the respondent claimed that the text of the confession was written for him. The jury could determine, after observing respondent testify, whether he, or the police officers, could have composed the confession.

C. The admission of the confession in the context of this trial was harmless error. Although the doctrine of harmless error is a criminal one, that principle is applicable here if criminal standards are applied to the confession. The prejudicial effect of the introduction of the confession was minimal, since respondent thoroughly described the confession in his own testimony, as did respondent's counsel in argument.

4. Jurisdiction is sought under 28 U. S. C. § 1254(1).

5. An extension of time is sought because of unexpected commitments occurring in the last three weeks prevented the undersigned from completing petitioners' brief. As an emergency matter, the undersigned was fully occupied with the preparation of legal memoranda, the interviewing of witnesses, and the trial on preliminary injunction in *Chicago Area Military Project* v. *City of Chicago*, United States District Court, Northern District of Illinois, No. 73 C 758, which concluded April 12, 1973. The undersigned was also engaged in the interviewing of witnesses, and the preparation for trial of *International Society for Krishna Consciousness* v. *Conlisk*, United States District Court, Northern District of Illinois, No. 73 C 73, in the week ending April 20, 1973, the trial for which was set for April 23, 1973 (but later postponed). In addition, the

undersigned completed, and on April 26, 1973, filed, the City of Chicago's brief in *Village of Bensenville* v. *City of Chicago*, Illinois Appellate Court No. 57070. This brief involved extensive research into the comprehensive federal law governing aviation and airports.

The petitioners' brief is presently in draft form. It is contemplated that the revision, approval by the undersigned's supervisor, and printing should require no more than three weeks.

6. The attorney for respondent, Mr. Wayne B. Giampietro, indicated in a conversation with the undersigned that he has no objection to this application for extension of time.

7. No prejudice will accrue to respondent if this extension is granted. Retrial may not commence in the District Court for the Northern District of Illinois until some indefinite time in the future. On April 27, 1973, effective May 1, 1973, Chief Judge Edwin A. Robson entered an order that, because of a crowded docket, all civil trials shall be held in abeyance until the disposition of criminal trials pending for more than ninety days.

Respectfully submitted,

/s/ RICHARD F. FRIEDMAN
Richard F. Friedman
Assistant Corporation Counsel
For: Richard L. Curry
Corporation Counsel of the City of Chicago
511 City Hall,
Chicago, Illinois 60602
Attorney for Petitioners

April 27, 1973.

CERTIFICATE OF SERVICE.

I hereby certify that on April 27, 1973, I mailed a copy of this application, postage prepaid, to Wayne B. Giampietro, attorney for respondent, 120 South LaSalle Street, Chicago, Illinois 60603. All parties required to be served have been served.

/s/ RICHARD F. FRIEDMAN
Richard F. Friedman
Attorney

FILE COPY

FILED
JUN 21 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-1547

JOHN MOHAN, WILLIAM BOYD, WESLEY BRODERSON, GEORGE POPLASKI, EDMUND DOBBS, AND BRUCE THOMPSON, INDIVIDUALLY AND AS POLICE OFFICERS OF THE CITY OF CHICAGO,

Petitioners,

VS.

HARVEY L. KERR,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-1547

JOHN MOHAN, WILLIAM BOYD, WESLEY BRODERSON, GEORGE POPLASKI, EDMUND DOBBS, AND BRUCE THOMPSON, INDIVIDUALLY AND AS POLICE OFFICERS OF THE CITY OF CHICAGO,

Petitioners,

VS.

HARVEY L. KERR,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Respondent prays that the requested writ of certiorari not issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on December 26, 1972.

STATEMENT OF THE CASE.

The statement of the case by Petitioners herein does not adequately set forth the issues in this case. Those issues are fully set forth in the two opinions which have been written in this matter by the United States Court of Appeals for the Seventh Circuit. The central issue in this cause is not whether defendants had probable cause to arrest plaintiff. Rather, as alleged in the Complaint, the issue was whether plaintiff's civil rights were violated by the actions of defendants, who, he alleged, severely beat him, detained him in excess of 24 hours without access to an attorney or to his family, without food, water, sleep or access to toilet facilities. Defendants did force a purported confession from plaintiff, and, while he was never convicted of the alleged crimes, he was forced to remain in Cook County jail, because of it, for a period of 18 months while criminal proceedings were pending against him.

Defendants' statements concerning the criminal proceedings are somewhat confusing, and do not set forth the proceedings accurately. When plaintiff was brought before a judge, more than 24 hours after he had been taken into custody "for questioning" by defendants, he immediately entered a plea of not guilty. He was brought to trial in that criminal matter, and the only evidence was the confession which had been extorted from him. Despite the introduction of this confession, the jury would not convict him, having been deadlocked. Subsequently, that confession was suppressed, as having been uncon-

stitutionally obtained. It was at that point that the criminal charges against plaintiff were dismissed by the prosecution. Significantly, the fact of this dismissal was not allowed to be presented to the jury in the trial of this cause.

REASONS FOR REFUSING THE WRIT.

Defendants have failed to present any valid reason why this Court should consider this case and overturn the decision of the Court of Appeals. Defendants' argument that it was necessary to their defense to introduce the entire body of the confession to the jury is spurious. Defendants argue, in effect, that they be allowed to rely on the details of a coerced confession to prove that they should have extorted it in the first place. Such an argument is indeed brazen. Actually, what defendants are asking the Court to do is to allow them to attempt to retry plaintiff's guilt before a jury where the real issue is whether his confession was voluntary or not.

A reading of the transcript of the trial below would lead one to believe that it was plaintiff who was on trial. Defendants, apparently taking to heart the adage that the best defense is a good offense, did their best to prove that plaintiff had in fact committed the crime with which he was charged, and of which he was not found guilty, and various other crimes, with which he was not even charged or tried.

The one and only issue to be determined here was whether plaintiff's civil rights had been violated. In

such a case, it is clear, that plaintiff's guilt or innocence of the crime with which he was charged at the time has absolutely no bearing upon that issue. There is no question that the entire thrust of the defense in this case was directed not toward whether plaintiff's constitutional rights had been violated, but whether plaintiff had been guilty of the crimes with which he was charged. For example, in his closing argument, defense counsel stressed this again and again:

> "Now, did they have reasonable grounds to arrest Harvey Kerr after he was in the station, keeping in mind that he came to the station voluntarily—Harvey Kerr admitted this; there is no dispute as to that. Now, what is the most reasonable ground the policeman could have that somebody committed the crime? A confession. What could be more reasonable than a confession that this person committed the crime?"

Indeed, defense counsel attempted to read the confession to the jury during closing argument.

Yet, no one has ever claimed that the fact that a confession had been given could not be brought home to the jury. And, it is agreed, that defendants are able to introduce to the jury that part of the confession wherein plaintiff allegedly stated that he was making it voluntarily. Yet, defendants wish this Court to take cognizance of this case and rule that they can not only show that plaintiff did in fact confess to a crime (which has never been disputed by plaintiff), but parade all of the gruesome details contained in that confession before the jury in order to make it well nigh impossible for the jury to focus upon the proper issues in this case—whether plaintiff's civil rights had been violated. As has been

emphasized by the Court of Appeals twice in this case, it makes absolutely no difference whether plaintiff was guilty of the crime charged or not. Even if guilty, he still would be able to recover damages for the violation of those rights. Indeed, the best statement of this issue is contained in the opinion of the Court of Appeals:

> "Certainly the nature of the confession reciting, as it did, the details of plaintiff's participation in the planning and execution of a burglary culminating in the violent death of the victim, could prejudice the jury against the merits of the plaintiff's claim in his civil rights case against the police officers. . . . The substance of the confession so irremediably interjected the question of plaintiff's guilt into this case that its prejudicial impact could not be cured by admonition to the jury that plaintiff's guilt was not at issue."

Defendants, in their Petition for Certiorari, have completely ignored this point, and have presented absolutely no reason why this Court should reverse such an obviously correct ruling. Defendants contend that this confession "is the best and most reliable evidence available to petitioners to rebut respondent's allegations." (Petition for Certiorari, p. 7) Such a contention is obviously spurious. How does the contents of this confession rebut any of the following facts, which are central to plaintiff's claim: that plaintiff was beaten and seriously injured; that he was not allowed to consult an attorney; that he was not allowed to see his family; that he was not given any food for 24 hours; that he was not allowed to use the toilet. Obviously, it has absolutely nothing to do with those claims. Even if every word in plaintiff's confession were true, the involuntary extortion of that confes-

sion from him would be a violation of his rights. Reading the contents of that confession must prejudice the jury against plaintiff and divert its attention from the true issue of the cause, particularly, as here, where it is claimed that the statements contained therein are false. The jury cannot help but speculate as to whether that confession is true or false, thus depriving plaintiff of the fair trial to which he is entitled.

The rights sought to be vindicated here are based upon the same reasoning which led to this Court's decision in *Escobedo* v. *Illinois,* 378 U.S. 478, 84 S.Ct. 1758 (1965), where it was said:

> "We have . . . learned the . . . lesson of history that no system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights. No system worth preserving should have to *fear* that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, those rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system."

It is the vindication of those rights which is at issue here, not whether plaintiff was guilty of a crime.

Finally, the most significant fact of all has been completely ignored by defendants. As noted in the opinion of the Court of Appeals, at the oral argument before that Court "counsel for defendants forthrightly admitted that *those parts of the confession referring to plaintiff's implication in the murder were not relevant to the issues at trial.*" (Petition for Certiorari, A. 3) Having made

that admission before the Court of Appeals, it is indeed surprising that defendants now have the temerity to ask this Court to reverse what they themselves admitted to be true. Such a position is indeed astounding.

Contrary to the argument made by defendants, the confession herein is not an admission by plaintiff against his contentions at this trial, except for that small part wherein he purports to state that it was made voluntarily. The issue is, again, whether the confession was made voluntarily, not whether he was guilty of a crime. This confession cannot be treated as an admission, except to the limited extent permitted by the Court of Appeals, because it has absolutely nothing to do with the central issue of this trial—its voluntariness. As recognized by that Court, the probative value of the details of this confession on this issue is so far outweighed by its obvious prejudicial impact as to make it obviously inadmissible. All of the cases cited by defendants in Section II of their argument are obviously not applicable to a situation such as this, and provide no support for their position.

Finally, the immense prejudice against plaintiff, as recognized by the Court of Appeals, cannot be brushed away with the appellation "harmless error." That argument was not raised by defendants below, and cannot be raised for the first time here. The constant emphasis upon those facts by defense counsel during the trial shows that he felt, contrary to the arguments made by defendants now, that the facts of the alleged crime were extremely important. Having made such great and telling

use of those alleged facts to plaintiff's detriment at the trial, defendants cannot be heard to say at this late juncture that they were unimportant. Their impact was incalculable. Only by allowing plaintiff a retrial, as ordered by the Court of Appeals, may this error be rectified.

Respondent, therefore, respectfully prays that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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